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MEMORANDUM

TO: California Performance Review Panel
Attn: Cathy Poncabare
FROM: Dale Mentink, Senior Attorney

RE: Recommendation # ETV 13

DATE: September 3, 2004

I. Summary.

Protection & Advocacy, Inc. respectfully **recommends against** the CPR report recommendation number ETV 13. ETV 13 recommends the transfer of special education due process hearing and mediation services from a private contractor, the Special Education Hearing Office of the McGeorge School of Law (hereafter "SEHO") to a state agency, the California Office of Administrative Hearings (hereafter "OAH"). PAI is concerned that the OAH's proposal to use generalist, rather than specialist, adjudicators and mediators to handle these cases, and its proposal to reduce costs by five to 30 percent, will lessen the quality of the service provided and will lead to greater long term costs and other adverse consequences to special education students and to their parents and schools.

II. Description of Protection & Advocacy, Inc.

Protection & Advocacy, Inc. (PAI) is a nonprofit corporation which provides legal advocacy, education, and training to or on behalf of persons with disabilities throughout California, so as to advance their human and legal rights. Each of the 50 United States, four federal territories, and the District of Columbia has a federally mandated and funded "protection and advocacy" organization pursuant to 42 U.S.C. § 15001, et seq., 42 U.S.C. § 10801, et seq., 29 U.S.C. § 794e, 29 U.S.C.

§ 3011, 29 U.S.C. § 3012, 42 U.S.C. § 1320b-20, 42 U.S.C. § 300d-53, and 42 U.S.C. § 15461-15462. PAI is the private, nonprofit California corporation organized and operated for the purpose of serving as the state-designated “protection and advocacy” agency for the State of California under these statutes.

Protection and Advocacy agencies, including PAI, are responsible to advocate for children with disabilities in public special education programs, among other individuals and populations.

PAI provides legal advocacy, education, training, and technical assistance services to special education students with developmental, mental, sensory, cognitive, learning, and physical disabilities in all California counties from regional offices in Sacramento, Oakland, San Diego, and Los Angeles. Pursuant to state contract, PAI also advocates for public school students with developmental disabilities who are clients of California’s 21 regional centers from satellite offices throughout the state. PAI also serves on various stakeholder task forces and committees on various aspects of special education policy and procedure. PAI also publishes a twelve-chapter manual on special education law for parents and advocates entitled *Special Education Rights and Responsibilities*. Special education law and advocacy constitute a significant portion of PAI’s practice on behalf of children with disabilities.

PAI’s attorneys and advocates practice before the hearing officers and mediators in the special education due process system which is the subject of recommendation number ETV 13. PAI also provides technical assistance and consultation to hundreds of other parents each year who are representing themselves and their special needs children in this dispute resolution system. PAI staff also practiced before OAH adjudicators and mediators when OAH performed special education due process work in the 1980s, and PAI continues to practice before OAH in other disability-related due process matters, such as services under the Lanterman Developmental Disabilities Services Act and the California Early Intervention Services Act.

III. Rationale Of PAI Against Transfer Of Special Education Due Process Proceedings To The Office Of Administrative Hearings.

To communicate its comments on proposal ETV 13 in a familiar and systematic way to the CPR panel, PAI has attempted to utilize, as much as possible, the CPR

panel's Health and Human Services Agency Stakeholder Survey questions below. The CPR's Health and Human Services Agency Stakeholder Survey requested commentators to respond to the following questions regarding CPR report recommendations:

1. Will The Proposal Improve Access To Services And Will It Make The Process Simpler For Customers/Clients?

No. The special education due process system was created by federal law for the benefit of students with disabilities and their parents. Title 20 United States Code. §1415(a)&(b)(6). It was not created for school districts or state agencies. SEHO performs these services in a way which makes the system more accessible to parents who are unrepresented by legal counsel.

Currently, parents are unrepresented by attorneys in these proceedings one-third of the time while districts are represented by lawyers 90 percent of the time. (See included Memorandum of PAI of July, 2004.) Special education law and procedure is so complex and daunting that even school district special education officials, whose entire careers involve application and implementation of special education law and programs, must be represented by legal counsel in these due process proceedings, even when their opponent parents are unrepresented.

SEHO has, over the 15 years it has held this contract, developed the practice of, and the expertise necessary for, developing the administrative hearing record and issuing carefully and thoroughly prepared decisions. SEHO's hearing officers make it a practice to ask the relevant questions that unrepresented parents are oblivious to asking of the key witnesses who testify. This practice may irritate school officials and their lawyers who may prefer that the key questions not be asked of the witnesses while they are under oath for fear of what their answers may be, and who would prefer that cases be decided on the basis of incomplete sets of facts. Nevertheless, a full and fair adjudication of these disputes requires the asking of all the hard and pertinent questions of the teachers and other personnel who know the child best. It is not the practice of OAH to take the time necessary to obtain a complete picture of a claimant's needs and to scrutinize the service agency's efforts to meet those needs.

The process will be less accessible to parents and students because it will demand that an even greater percentage of them be represented by legal counsel in these proceedings to be at all competitive with the school districts' lawyers who are present in over 90 percent of cases. Those families without the financial means to obtain legal representation will be increasingly shut out of the system all together.

Rather than simpler, the process will require parents to become better legal advocates with better skills of direct and cross-examination and use of documentary evidence and better knowledge of the strategies for educating students with disabilities and of the statutes, regulations, and judicial decisions which govern this program. On the contrary, rather than making the process simpler and more accessible to the people for whom the system was created, the transfer of this work will narrow the field of those who can participate in it effectively. There will be no assurance, after the parent's disorganized and truncated effort to present the relevant facts and applicable law, that the hearing officer will make any effort to ferret out all the necessary information and do the necessary legal research to conduct a sufficiently careful and thorough analysis.

2. Will The Proposal Improve The Delivery Of Services?

No. For the reasons discussed above, service delivery will suffer. If the service is due process of law, only those parents who are represented by legal counsel (who can make the necessary record and call the judge's attention to the governing law and who are capable of appealing the matter to court, if necessary, to obtain application of the governing law to the relevant facts) will experience anything like due process.

PAI is informed that if OAH is awarded this contract, it will use generalist administrative law judges, who hear disputes involving 100 different state entities and over 800 local government agencies^[1], to conduct these mediations and hearings.

For the last fifteen years while the SEHO has performed this work, it has used mediators and hearing officers who handle nothing but special education matters to conduct special education due process in California. OAH conducted these hearings and mediations prior to SEHO for a number of years in the 1980s, but it did so using hearing officers and independently contracted mediators who were designated to hear the special education cases. If OAH is awarded this contract and uses staff who only occasionally hear a special education case, OAH will deliver a service which will lack the careful and thorough analysis required for the

¹ The OAH has been seeking, through a series of State Personnel Board petitions, to have special education due process hearing and mediation work transferred back to it from the McGeorge School of Law for several years. The facts regarding how many different agencies OAH hears disputes for are from one of the briefs filed by counsel for the California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment in case number PSC No. 03-04 (2004).

disposition of these cases by the federal courts and will cause an increase in the number of appeals filed by one side or the other.²

3. Will The Proposal Improve Outcomes?

No. The parties need finality in these proceedings. One or the other party will lose. But losing for reasons which one can understand brings more closure than losing and being unable to identify a line of reasoning between the evidence and the judge's findings of fact or between the findings of fact and the conclusions of law.

The outcomes now are that the SEHO hearing officers, by being specially trained in special education law and procedure and by focusing exclusively on those cases, have been reversed by the courts only eight times in over 1,000 cases during the last 15 years. By using generalists and by attempting to offset higher state employee judges' salaries (see Q&A 5 below) with more cursory treatments of each case and decision, the OAH will likely be appealed, and appealed successfully, in far more cases. This will only lessen the finality and predictability of result and increase the overall costs and delays to the parties and ultimately to the state.

4. What Will Be The Impact On The Service Provider Network?

If the service provider network is defined as the school districts that provide special education, the impact will be similarly negative. Legal counsel for the schools may also have to appeal decisions which are internally inconsistent or which make findings of fact on the basis of evidence not in the record or which apply the wrong law. Where there is an appeal, by either the parent or the school district, the obligations of schools may remain unclear until the appeal is resolved.

5. Will The Proposal Improve Program Efficiency?

No. An efficient due process system is one in which disputes are adjudicated, findings of fact are made based on the evidence, and the law is applied in a

² Since OAH gave up special education due process work in 1989, the standard of judicial review of these administrative hearing decisions has been further clarified and heightened. Decisions are upheld by the courts after the courts have examined the "carefulness and thoroughness" applied by the hearing officer in his/her written decision. *Capistrano Unified School District v. Wartenberg*, 59 F.3d 884 (9th Cir. 1995).

coherent decision. The parties may not like the result, but the dispute has been resolved in a timely way and the parties must move forward.

An efficient due process system is also one where outcomes can be predicted on the issues with a reasonable degree of certainty depending on the relevant evidence, the applicable law, and the history of rulings by other hearing officers in the same or similar situations. In such a system, many more cases can be resolved at the mediation level because the mystery of how the case would turn out, if it was presented at an evidentiary hearing, is minimized. If this level of predictability and consistency is lost because one does not know whether he/she will be assigned an administrative law judge who is familiar with this system and area of law or not, and/or who will take the time necessary to carefully and thoroughly adjudicate and decide the case, many more cases will proceed to hearing and to court-level appeals than currently do.

In the Fiscal Impact section of the CPR at ETV 13, OAH asserts that it can save between five and 30% of the cost of special education due process services in California per year if it is awarded this contract. PAI is informed that OAH employs administrative law judges who earn between \$80,000 and \$103,000 per year and that OAH plans to use its administrative law judges in the role of mediators if it obtains the special education due process contract. PAI is also informed that OAH charges for the services of its administrative law judges at the rate of \$169.00/hr. Currently, SEHO pays its hearing officers between \$72,000 and \$92,000 per year and pays its mediators between \$50 and \$75 per hour, depending on experience. For OAH to achieve the savings predicted in its representations to the CPR, or any savings at all, its judges will, of necessity, have to spend considerably less time in mediating or adjudicating each case and in preparing each written decision. Any short-term savings will be more than offset by the costs to the parties of cases that fail in mediation and must proceed to hearing or that proceed into the courts because of the vulnerability of the administrative hearing decisions.

IV. Conclusion.

For the reasons stated above, PAI recommends against the proposal contained in the CPR at ETV 13 and requests, on behalf of the students and parents for whom special education due process exists, that the work continue to be done by the McGeorge School of Law, Special Education Hearing Office.

Thank you for your consideration of these comments. Please contact PAI if you would like any further information or input regarding this recommendation.

Enclosure



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MEMORANDUM

TO: Interested Persons

FROM: Dale Mentink, Senior Attorney

RE: Use Of Attorneys By Parties To Due Process, Jan, 2001- June, 2004
And Hearing Results

DATE: July, 2004

<u>Quarter</u>	<u>Final Decisions</u>	<u>% LEA* w/ counsel</u>	<u>% parent w/ counsel</u>	<u>% LEA prevailed**</u>	<u>% parent prevailed**</u>
Jan-March, 2001	21	90%	57%	43%	24%
April-June, 2001	29	90%	59%	34%	21%
July-Sept, 2001	29	97%	69%	45%	34%
Oct-Dec, 2001	33	97%	51%	58%	24%
Jan-March, 2002	32	87%	59%	38%	28%
April-June, 2002	30	93%	67%	40%	50%
July-Sept, 2002	35	86%	68%	51%	26%
Oct-Dec, 2002	39	90%	77%	41%	15%
Jan-March, 2003	41	93%	63%	49%	20%
April-June, 2003	41	90%	65%	39%	29%
July-Sept, 2003	33	100%	76%	52%	18%
Oct-Dec, 2003	30	87%	67%	47%	30%

Jan-March, 2004	33	79%	60%	45%	18%
April-June, 2004	41	92%	63%	51%	7%
Total/Averages	467	91%	64%	45%	25%

* LEA (Local Education Agency)

**The remaining decisions were split decisions.